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FILED
JUN 16 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2347

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON and DWIGHT G. HUDSON,

Petitioners,

vs.

ARIZONA STATE DENTAL ASSOCIATION, AN Arizona Non-Profit Corporation; CENTRAL ARIZONA DENTAL SOCIETY, an Arizona Non-Profit Corporation; AMERICAN DENTAL ASSOCIATION, an Illinois Non-Profit Corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not constitute an illegal tying arrangement in violation of the Sherman Act and the Clayton Act?

2. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not suppress competition between dentists in violation of the Sherman Act and the Clayton Act?

3. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the Respondents have not monopolized the area of dental services supplied to dentists by these Respondents in violation of the Sherman Act?

4. Did the United States Court of Appeals for the Ninth Circuit err in failing to hold that the compulsory cross-membership requirements between the three Respondents constitutes an unreasonable restraint of trade as a matter of law in violation of the Sherman Act?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For the Ninth Circuit, entered in this proceeding on March 24, 1982, and the denial of the Petition for Rehearing on May 7, 1982.

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not constitute an illegal tying arrangement in violation of the Sherman Act and the Clayton Act?

2. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not suppress competition between dentists in violation of the Sherman Act and the Clayton Act?

3. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the Respondents have not monopolized the area of dental services supplied to dentists by these Respondents in violation of the Sherman Act?

4. Did the United States Court of Appeals for the Ninth Circuit err in failing to hold that the compulsory cross-membership requirements between the three Respondents constitutes an unreasonable restraint of trade as a matter of law in violation of the Sherman Act?

OPINIONS DELIVERED BELOW

There was no formal opinion of the United States District Court for the District of Arizona. However, the District Court did enter a Minute Entry dated March 3, 1975, dismissing the Amended Complaint, which said Order is reproduced in Appendix A to this Petition.

Appearing as Appendix B to this Petition, is the initial Opinion of the Court of Appeals, reversing the District Court, as reported in 549 F.2d 626 (1977).

Reproduced in Appendix C is the Order of this Court denying Certiorari, on October 3, 1977.

Appearing as Appendix D are the Findings of Fact, Conclusions of Law and Judgment, as entered by the District Court on August 29, 1980.

Appearing as Appendix E is the Memorandum Decision of the Court of Appeals, Ninth Circuit, entered March 24, 1982.

Appearing as Appendix F is the Order of the Court of Appeals, Ninth Circuit, denying the Petition for Rehearing, entered May 7, 1982.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 24, 1982 (App. E, infra). A timely Petition for Rehearing was denied on May 7, 1982 (App. F, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTORY PROVISIONS INVOLVED

This action involves §§ 1 and 2 of the Sherman Act (Title 15, U.S.C., §§ 1 and 2) and § 16 of the Clayton Act (Title 15, U.S.C., § 26, as amended). See Apps. G, H and I, infra.

STATEMENT OF THE CASE

Petitioners are all licensed dentists within the State of Arizona. Petitioners Peay, Thompson and Hudson are engaged in active practice, Petitioner Boddicker, for reasons hereinafter discussed, having terminated his practice in 1974. Respondent Arizona State Dental Association (hereinafter "ASDA") is an Arizona non-profit corporation, incorporated in 1951. Respondent Central Arizona Dental Society (hereinafter "CADS") is also an Arizona non-profit corporation, incorporated in 1961. The ASDA and CADS maintain a joint office and place of business in Maricopa County, Arizona. Respondent American Dental Association (hereinafter "ADA") is an Illinois non-profit corporation, having its principal office and place of business at Chicago, Illinois. Respondent ADA has, by its Bylaws, designated Respondents ASDA and CADS as constituent and component societies, respectively, of the ADA, and has required Respondents ASDA and CADS, as a condition to membership in the ASDA and CADS, to require their respective members to not only pay dues for the said State and local societies but, in addition, to also pay dues for membership in the ADA. This practice has been acquiesced in, nurtured, supported and enforced by the

Respondents ASDA and CADS and, in addition, has been implemented in the Bylaws of the ASDA and CADS. Thus, a dentist practicing within Maricopa County, Arizona, wishing to become a member of the CADS, tenders his application to the CADS, along with the dues for the ASDA and ADA. Upon acceptance of his membership by the CADS, he automatically becomes a member of the ASDA and ADA. Out of the total amount of dues tendered with his application, the CADS retains its portion, remitting the balance to the ASDA, which extracts its portion and remits the ADA portion to its offices at Chicago, following which the dentist is automatically enrolled as a member of the ADA. The ADA does not even so much as see a copy of the membership application, enrolling the member strictly on the basis of the remittance by the ASDA.

The foregoing procedure, as to the initial enrollment of a member, is also followed in the collection of the annual membership dues, in that the CADS collects the entire amount of the dues for the CADS, ASDA and ADA, with the remittance and transmittal being as aforesaid. The procedure followed in Arizona is identical to the procedure followed in each and every State of the United States where there is a constituent and/or component society of the ADA. Admittedly, (1) there is no dentist who is a member of any constituent or component society who is not also a member of the ADA (Plaintiffs' Exhibit 50, p. 13 - ADA Answer to Plaintiffs' Interrogatory No. 59), and (2) there is no State within the United States in which a constituent society of the ADA does not exist (Pretrial Order, p. 14, Lines 6-7, CR178).

Membership in the ADA does not require the showing of any particular professional ability or professional expertise. R.T., Vol. 1, p. 60, Line 23 - p. 61, Line 10.

Petitioners' evidence shows that they, as well as all other dentists similarly situated, derive particular benefits from membership in the CADS and, to a lesser degree, in the ASDA, but with only nominal, if any, benefit from membership in the ADA; that the only benefit which might be derived from membership in the ADA is the receiving of the Journal of the American Dental Association, but which can be obtained without ADA membership. The primary, and most important, benefit derived from membership in the CADS is the continuing dental educational programs conducted and made available by said Society, plus the opportunity for exchange of information with fellow practitioners who are also CADS members and the referral of patients by fellow members. And the ASDA, although providing only a limited continuing educational program, does have an insurance program which is important to its members. Petitioners' testimony shows, specifically, that the professional skills of any dentist are enhanced or increased by his membership in the CADS; that CADS membership enables a dentist to have a more efficient and professional operation of his office than a non-member.

The evidence of the Petitioners also shows that, without membership in the ADA, Petitioners and all other dentists similarly situated are deprived of the right to belong to any specialty group, or any professional

and/or technical society recognized by the Respondent ADA.

The activities of the ADA are all conducted in interstate commerce, including the extraction of dues from Petitioners and all other dentists similarly situated, both in Arizona and each of the other States. In 1972, the ADA collected dues in excess of $6,000,000.00. By 1979, this figure had climbed to almost $15,000,000.00. In the same period of time, the annual ADA dues have increased from $70.00 per year to $150.00 per year, with a further increase to $300.00 per year under consideration.

Both Petitioner Boddicker and Petitioner Peay objected to the payment of dues for the ADA and, for the year 1972, tendered dues for only the CADS and ASDA. Each was threatened with expulsion from membership unless the dues for all three organizations were paid. See Plaintiffs' Exhibits 39-45. Dr. Boddicker refused to pay the ADA dues and was expelled from membership in all three organizations. Dr. Peay, not wanting to be deprived of his membership in the CADS, finally relented and paid the dues for all three organizations, doing so under protest. Dr. Boddicker, a prosthodontist, whose practice depended upon referrals, continued in practice until mid-1974, when he finally decided to terminate his practice, due to the fact that he ceased receiving any referrals from the CADS, plus a diminishing of the referrals from CADS members.

The Petitioners testified that, except for the mandatory membership requirements, as aforesaid, they would not have retained

membership in the ADA. R.T., Vol. 1, p. 89, Lines 20-25; R.T., Vol. 2, p. 11, Line 21 - p. 12, Line 1 and p. 37, Lines 12-17.

REASONS FOR ALLOWANCE OF THE WRIT

This Petition raises questions of national importance involving the application of the antitrust laws and, particularly, to professional organizations.

Although this action was brought by only four dentists, the facts involve thousands of other dentists similarly situated, scattered throughout the United States. And a great deal of confusion exists as to the relative rights and obligations of professional organizations and their members, beginning with Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004 (1975), with each case having its own peculiar set of facts, with the result that each successive case has plowed almost virgin soil.

This case can have a resounding application to dozens and dozens of professional organizations in the United States. Therefore, it is deserving of careful consideration, and something other than the cavalier treatment it has received in the District Court and most recently, in the Court of Appeals.

Each of the three Respondents is a unique organization. Likewise, in other States, the respective constituent and/or component society is also a unique organization. For a dentist who is disinterested in all of the organizations, there is no market for any of

them. But to another dentist, there may be a market for one or more, but not all, of the Respondent organizations. But the Respondents, by their membership arrangement, have created a forced market for the unwanted and/or undesired organization membership. Where a dentist desires to belong to his local (component) society, and even though he may, as a matter of judgment, and perhaps because of his particular situation, determine he has no need to belong to the constituent and/or national organization, he is, nevertheless, as a condition to membership in his component society, compelled to also pay membership dues for, and to join, his constituent and national organizations.

Thus, the Court commits a basic error when it confuses lack of a "competitive market" with a forced market, i.e., an unwanted membership in one or more of the Respondent organizations.

It is fallacious to state that

> "Membership in the local and state groups cannot be characterized as a product or service distinct from ADA membership.",

for, as we have seen, a dentist in the Federal Dental Services (Army, Navy, VA, Public Health Service) is allowed to obtain membership in the ADA, but without membership in a constituent or component society. Thus, the ADA, at least, gives recognition to a separate and distinct ADA membership.

The undesired or unwanted membership can be compared to a product or merchandise which a party is required to purchase as a part of a tying arrangement in order to obtain a desired product, even though he has no need, and there is no "competitive market" for the tied product. See Chatham Condominium Associations v. Century Village, Inc., 597 F.2d 1002 (5th Cir. 1979), where condominium developers, in the sale of a condominium, required the purchaser to enter into a 99-year recreational facilities lease; and also Miller v. Granados, 529 F.2d 393 (5th Cir. 1976), where a condominium developer, in the sale of a condominium, required the purchaser to enter into an operational management agreement.

In Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1218 (3rd Cir. 1976), cert. denied 429 U.S. 823, 97 S.Ct. 74 (1976), the Court, quoting from the Northern Pacific Railway Company landmark case, says:

> "Northern Pacific Ry. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 550 (1958), perhaps the fountainhead of tying law under § 1 of the Sherman Act, provided the following exposition of the theory of the law of tying:
>
> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any

other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products."

In United States v. National Association of Broadcasters, 1982-1 Trade Cases, ¶ 64567, p. 73100 (D.C. D of C, March 3, 1982), the issue involved a regulation prohibiting a television station from advertising more than one product in a commercial lasting less than sixty seconds. In passing, and declaring a per se violation, and in reference to Northern Pacific Railway Co. v. U. S., supra, the Court stated (at pp. 73109-10):

"The tying cases, to be sure, are not technically applicable in this instance because the additional amount of commercial time advertisers are required to purchase under the multiple product standard does not represent a 'different product' from the time the advertisers actually desire to purchase. However, the rationale

> underlying the rule against tying--that sellers should be precluded from using their market power to force a buyer to purchase and to pay for something he does not want--applies precisely in this case. NAB has used its dominance in the television industry to require companies who desire to advertise more than one product on television to buy more than they wish to purchase. Thus, the coercive use of market power to restrict buyers' decision-making which is at the heart of tying is also present in the provision at issue here. See P. Areeda, Antitrust Analysis ¶ 541 (1981)." (Underscoring inserted.)

In Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3rd Cir. 1977), cert. denied 434 U.S. 1086, 98 S.Ct. 1280 (1978), the Court, in commenting upon Ungar, states:

> "It has never been an element of plaintiff's case to disprove, nor even a permitted defense, that the tied product is superior to others available on the market, or that even without the tie requirement plaintiff would have purchased the tied product. * * *" (Underscoring inserted.)

See also Heatransfer Corp. v. Volkswagenwerk, A. G., 553 F.2d 964, 975 (5th Cir. 1977).

To prove a per se illegal tie-in, a claimant must establish three things:

(1) "* * * an agreement by a party to sell one product but only on the

condition that the buyer also purchases a different (or tied) product * * *" Northern Pacific Railway Co. v. U. S., supra, 356 U.S. at p. 5, 78 S.Ct. at 518, 2 L.Ed.2d at 550;

(2) That the seller

"has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. * * *" Ibid. at p. 6; and

(3) that

"a 'not insubstantial' amount of interstate commerce is affected." Ibid. Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1223-24 (3rd Cir. 1976), cert. denied 429 U.S. 823, 97 S.Ct. 74 (1976).

The activities of the ADA run a gamut ranging from the sale of hundreds of catalog items to the sale of various publications, including the ADA Journal and the solicitation of advertising therefor, accreditation of dental programs for hospitals, colleges and universities, and a host of other material, services and programs, none of which are independently offered by any of the constituent and component societies. On the other hand, the State (constituent) society offers a separate and distinct group of products and services to its members. Likewise,

the local (component) society offers a third group of products and/or services, such as referral services, seminars, education programs and, most importantly, exchange of ideas and information with fellow members. The testimony of the Petitioners was that, in the order of importance, the local society was the most important, followed by the State society and, to a much lesser degree, the ADA. However, as we have seen, regardless of the importance of the programs and/or services rendered by either organization, or the reasons for membership, or the benefits to be derived therefrom, a dentist has no choice and, accordingly, must support all three organizations and their programs, whatever they might be, in order to have the benefit of the program of one organization.

The ADA has been in existence for approximately ninety years, the ASDA since 1951, and the CADS since 1961, and the tying membership arrangement has been in effect during the entire period the ASDA and CADS have been in existence. But in considering the question of economic power "with respect to the tying product", and although the ADA, by its By-laws, and prior to 1951, established requirements as to membership, the CADS and ASDA, and likewise all constituent and component societies in the United States, have nurtured, acquiesced in and, frankly, enforced the membership requirements, as imposed by the ADA. Based upon the testimony, it would appear that, on a local basis at least, the CADS has economic power equal to that of the ASDA or the ADA. Locally, it is

the CADS which offers the greatest benefits to a dentist, and the CADS, like the ASDA and the ADA, has "the only game in town", with the result that a dentist has no alternative in seeking the services offered by the CADS, and is compelled, whether voluntarily or involuntarily, to support, and be a member of, the ASDA and the ADA.

The Ninth Circuit Opinion states:

> "Finally, even if ADA membership is a product distinct from membership in the ADA's constituent and component societies, the latter derive no economic benefit from sales of ADA memberships, the alleged 'tied product' so that no per se illegal tying arrangement can be found."

However, in Robinson v. Magovern, 521 F. Supp. 842, 907 (D.C. Pa. 1981), it is said:

> "A court will find the necessary collaboration even where the first entity does not receive any benefit from the concerted activity and acts only in response to coercion.",

citing Albrecht v. Herald Co., 390 U.S. 145, 149-50, n. 6, 88 S.Ct. 869, 871-872, n. 6, 19 L.Ed.2d 998 (1968) which, in dealing with this same question, says:

> "The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose

> because they cooperated in terminating price-cutting retailers." (Underscoring inserted.)

Thus, the law seems to be that if a person, willingly or unwillingly, with or without coercion, and with or without receiving any benefit, goes along, either actively, or by mere acquiescence, an illegal combination has been established. See also Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1321-22 (9th Cir. 1975), cert. denied 423 U.S. 1053, 96 S. Ct. 782, 46 L.Ed.2d 642 (1976).

Thus, the statement that the CADS derives no economic benefit from sales of ADA membership cannot be sustained because the membership of the CADS is supported by either the ASDA or ADA each time a dentist seeks membership in either organization, at which time he is compelled to accept membership in the other two organizations. Regardless of which door he knocks at, he always winds up back at the door of his component society. In other words, each of the three Respondent organizations benefits every time a dentist desires membership in any one of the three organizations.

To summarize on the question of the tying arrangement and its necessary elements, we go to Rosebrough Monument Company v. Memorial Park Cemetery Association, 666 F.2d 1130, 1142 (8th Cir. 1981), where the Court says:

> "Monopoly power or dominance in the tying market need not be shown. Fortner I, supra, 394 U.S. at 502,

89 S.Ct. at 1258; Northern v. McGraw-Edison Co., supra, 542 F.2d at 1347. Sufficient economic power exists if the supplier of the tying product has sufficient leverage in the market to increase prices or to force a significant number of buyers to accept burdensome terms. Fortner I, supra, 394 U.S. at 501-03, 89 S.Ct. at 1257-58.

"It is unnecessary for appellant to prove by voluminous economic data that appellees have a strangle hold on the tying market. See Markovits, Tie-Ins, Reciprocity, and the Leverage Theory, 76 Yale L.J. 1397 (1967). Where the sellers are of sufficient size to exert some power, control or dominance over the tying product, the threshold standard of economic power has been met. Osborn v. Sinclair Refining Co., 286 F.2d 832, 838 (4th Cir. 1960) (Osborn) (illegal tying arrangement for supply of oil and machinery), cert. denied, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed.2d 1255 (1961).",

and further stating:

"* * * we find that in order to answer the question of economic power we look to whether the characteristics of the tying product are unique.",

citing International Salt Co. v. U. S., 332 U.S. 392, 395-96, 68 S.Ct. 12, 14-15 (1947); U. S. v. Paramount Pictures, Inc., 334 U.S. 131, 157-59, 68 S.Ct. 915, 929 (1948); U. S. v. Loew's, Inc., 371 U.S.

38, 49, 83 S.Ct. 97, 104, 9 L.Ed.2d 11 (1962); and, of course, Northern Pacific, supra, 356 U.S. at 8-12, 78 S.Ct. at 519-21.

The interstate commerce question is no longer an issue in this case, the Respondents having conceded that the interstate commerce question has been satisfied, and the District Court so found.

Both the District Court and the Court of Appeals completely missed the point on the question of suppression of competition, restricting the issue to simply "competition between dentists".

The basic flaw stems from the fact that the Respondents, by their membership tying arrangement, have eliminated competition as between themselves. It has been repeatedly held that

> "The anti-trust laws are as much violated by the prevention of competition as by its destruction. * * *". United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 945 (1948).

Thus, when either of the Respondents collects a membership fee, each of the other two Respondents also receives a fee. Rivalry has fallen by the wayside. However, in maintaining the unlawful combination, a dentist who chooses to support, and to belong to, his local organization, is penalized, in that he, along with his thousands of co-practitioners, must earn those additional dollars to not only pay the membership for his local society, but

for his State and national organizations. Furthermore, from a strictly local standpoint, the evidence shows that since the inception of this litigation, dentists, who are not members of any of the Respondent organizations, have been allowed to participate in the educational courses, being charged the same fees as the member dentists, but the member dentist is penalized because, in addition to the fees for the educational courses, he is also paying for a membership fee in each of the Respondent organizations. Thus, competition is suppressed as between dentists, as a direct and proximate result of the membership arrangement among the Respondents, forcing a dentist to pay out money for a membership which he may not want.

Petitioners testified, and Respondents did not seriously dispute, that those dentists who belong to the CADS have better skills, make more money, and are better able to serve the public and, therefore, the quality of care is improved, with the resulting benefit to the general public. But, to gain those skills, increase his earnings and enhance his expertise, a dentist is saddled with the cost of belonging to the other two Respondent organizations. In other words, by not being able to belong to the CADS, if he should so choose, and being required to also belong, and to pay dues, to the ASDA and the ADA, his costs are increased, with a proportionate decrease in his income, with the result that there is a lessening of competition between dentists. As we have seen, in 1972, the ADA collected dues in excess of $6,000,000.00. By 1979, this figure had

climbed to almost $15,000,000.00. That sum was contributed by approximately 80% of the dentists practicing within the United States, and serves to reduce the income and/or purchasing power of the dentist or, if he passes it on to his patients, it is another burden carried by the general public.

Finally, there is the statement by the Ninth Circuit that

> "* * * the District Court did not err in finding that the defendant organizations have not monopolized the practice of dentistry in Arizona. These organizations, in fact, do not engage in the practice of dentistry, nor is membership in them a precondition for an Arizona dental license."

Of course, we have to concede that the Respondents do not practice dentistry, but what about the grasp--the strangle hold--by which the Respondent organizations hold their respective (identical) members?

In Fortner II, 429 U.S. 610, 619-620, 97 S.Ct. 861, 867-868 (1977), the Court, in discussing the question of monopoly, and making reference to International Salt, Paramount Pictures, Loew's, and Northern Pacific, supra, stated:

> "As the Court plainly stated in its prior opinion in this case, these decisions do not require that the defendant have a monopoly or even a dominant position throughout the

market for a tying product. See 394 U.S. at 502-503, 89 S.Ct. at 1258. They do, however, focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product."

And a similar statement appears in Robinson v. Magovern, 521 F.Supp. 842, 886-887 (D.C. Pa. 1981), where the Court says:

"In order to establish that a defendant has committed the offense of monopolization, the plaintiff must prove '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). A defendant possesses monopoly power if it has the ability to change the competitive variables of a product to the disadvantage of consumers without causing effective competitors to enter the relevant market. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391-92, 76 S.Ct. 994, 1004-05, 100 L.Ed. 1264 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 811, 66 S.Ct.

1125, 1139, 90 L.Ed. 1575 (1946)."

And the Court's discussion of the market percentage necessary to constitute a monopoly, on Page 887, certainly is most applicable to this case, clearly demonstrating that the three Respondent organizations very definitely have a monopoly in their respective sphere of operation. And, as we have shown, although the dues of the Respondent organizations continue to increase, an "effective" competitor has not entered the "relevant market".

The fact that the Respondents do not practice dentistry does not lessen their ability to gain a strangle hold on their membership and, by their unlawful membership tying arrangement, to extract fees from the dental profession, and thereby cause damage. In other words, it is the dentist who stands within the range of fire of the Respondents who suffers. Every dentist, whether he be, or not be, a member of the Respondent organizations, is necessarily, and directly, affected by their activities. A similar situation is to be found in Strax v. Commodity Exchange, Inc., 524 F.Supp. 936, 939-40 (D.C. N.Y. 1981), which was a class action brought against silver buyers, commodity brokerages, commodity exchanges, and others for alleged antitrust violation and for alleged violations of the Commodity Exchange Act. The defendants argued that the complaint was defective because Strax did not allege that he or the members of the proposed class

> "* * * entered into transactions directly with the defendants, * * *"

However, Strax contended that he traded in the very market which the defendants are alleged to have manipulated, although not directly with the defendants, and that proof of the impact of defendants' alleged action on that market would not require speculation or attenuated theories of causation. The Court upheld the contention of Strax, on the basis that he and the group which he proposed to represent were within the "target area" of the defendants' alleged anticompetitive behavior;

> "* * * that is, their anticompetitive behavior was 'aimed' at the plaintiffs."

And we have that exact same situation here, in that the Petitioners, and all other dentists similarly situated, are within the target area of the activities of the Respondents. Petitioners, and all other dentists similarly situated, have been made to "feel the squeeze of a conspiracy" and, therefore, have standing to bring this action. Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 396 (4th Cir. 1974); Mims v. Kemp, 516 F.2d 21, 23 (4th Cir. 1975).

It has been repeatedly held that

> "When a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se." Catalano,

Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 1928 (1980); see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562 (1979).

Again, to focus the issues, we pose the following questions:

A. Without the tying arrangement:

(1) Would all dentists who obtained membership in their constituent and component societies also, voluntarily, obtain membership in the ADA?

(2) Would all dentists obtain membership in both their constituent and component societies, or would they only obtain membership in one such organization?

B. If ADA membership is of value and importance to a dentist, would not the average dentist obtain membership in the ADA, even on a voluntary, non-compulsory basis?

The Respondents cannot contend that questions A.(1) and B must be answered in the negative. And if said questions can be answered in the affirmative, then the Respondents, and particularly the ADA, have nothing to worry about. See H. A. Artists & Associates, Inc. v. Actors' Equity Association, ____ U.S. ____, 101 S.Ct. 2102, 2106-7, 2113 (1981), where agents were

required to pay franchise fees to Equity, and the Court posed the question:

> "If Equity did not impose these franchise fees upon the agents, there is no reason to believe that any of its legitimate interests would be affected."

It seems only reasonable to assume that if the ADA provides any and all of the services and benefits to the dental profession, as contended by the Respondents, its membership would not suffer if placed on a voluntary basis. For example, the American Bar Association only requires that an applicant for membership be duly licensed to practice in some State, and with no requirement as to membership in any other organization. Nevertheless, the ABA, over the years, has maintained a membership consisting of a certain percentage of all lawyers in the United States, and with very little variance in its membership, as related to the total number of licensed lawyers.

Respondents have never so much as even suggested any valid reason as to just why membership in the three Respondent organizations should be on an all-or-none basis, and without any choice, except as to those dentists in the Federal Dental Service.

The fact that membership in any of the Respondent organizations is not a condition to practice, does not minimize the claim of monopoly, but the fact that three (3) corporations have conspired to kill competition as between themselves and thus

deny a dentist such freedom of choice as his professional standing, specialty, or goal, coupled with his pocketbook, may dictate, certainly does suppress competition as between dentists, particularly as to the dentist who, for whatever reason, finds himself in a position of not being able to afford the total cost as mandated by the Respondents, and also the ADA and any other constituent and component societies. A dentist who is compelled to accept, and pay for, membership in his constituent society and the ADA, as a condition to membership in his component society, suffers financially and, in addition, his costs in providing dental services to his patients are thereby increased, with resulting damage to himself and to the public at large.

As to any of the Respondents, including any other constituent and/or component society, if they, or any of them, have merit and perform an important function for a dentist, he will purchase a membership, and without compulsion.

Under the facts, and the law of the cases cited, it seems clear that the tying arrangement maintained by the Respondents constitutes a per se violation and, therefore, Petitioners are entitled to judgment as a matter of law.

CONCLUSION

In summary, it clearly appears that:

A. The decision of the Ninth Circuit Court of Appeals, in affirming the judgment of the District Court, is

clearly in conflict with the decisions of other Federal Courts of Appeals on the same subject matter;

B. The Ninth Circuit Court of Appeals, in its opinion, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the power of supervision of this Court;

C. The decision of the Ninth Circuit Court of Appeals is in conflict with the applicable decisions of this Court, as above set forth.

WHEREFORE, for the reasons set forth in this Petition, a Writ of Certiorari should be granted.

DATED: June 11, 1982.

RESPECTFULLY SUBMITTED,

ERHARD, COX & RUEBEL, P. C.
CARL W. DIVELBISS

By
Carl W. Divelbiss
Attorneys for Petitioners

APPENDIX

APPENDIX A

Vernon S. Boddicker, et al. v. Arizona State Dental Association, et al.

U. S. District Court, District of Arizona, No. Civ. 72-259. Minute entry dated March 3, 1975.

Craig, D. J.: Hearing had on defts' Motion to Dismiss pltfs' First Amended Complaint. Carl Divelbiss present for pltf, Peter Sfikas present for defts. It is ordered that the Motion to Dismiss is granted as follows: (1) the anti-trust claim should be dismissed because the activities complained of do not affect interstate commerce and because the procedures involved in joining professional associations do not constitute "trade or commerce" within the purview of the anti-trust laws; (2) the constitutional due process claims are dismissed due to the absence of any state action in the activity complained of; and (3) the claims pursuant to the state law are dismissed due to the absence of any federal claims to which the state claims could be pendent.

APPENDIX B

BODDICKER v. ARIZONA STATE DENTAL ASS'N.

Amended March 1, 1977

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON and DWIGHT G. HUDSON, Plaintiffs-Appellants,

v.

ARIZONA STATE DENTAL ASSOCIATION, an Arizona Non-Profit Corporation; CENTRAL ARIZONA DENTAL SOCIETY, an Arizona Non-Profit Corporation; AMERICAN DENTAL ASSOCIATION, an Illinois Non-Profit Corporation.
No. 75-1846.

Opinion of the Ninth Circuit
549 F.2d 626

OPINION

SNEED, Circuit Judge:

This case comes before us as an appeal from a dismissal by the district court of plaintiffs' amended complaint for lack of subject matter jurisdiction under §§ 1 and 2 of the Sherman Act[1] and for failure to state a claim upon which relief could be granted.[2] Plaintiffs, licensed dentists within the State of Arizona, alleged that

1. 15 U.S.C. §§ 1,2 (1970).

the American Dental Association (hereinafter referred to as the "ADA"), the Arizona State Dental Association (hereinafter referred to as the "ASDA"), and the Central Arizona Dental Society (hereinafter referred to as the "CADS"), have agreed among themselves to require membership in the ADA as a condition precedent to membership in the ASDA and the CADS, thus creating an anticompetitive tying arrangement by coupling participation in the local organizations' beneficial programs to membership in the ADA. Plaintiffs contend that this practice violates §§ 1 and 2 of the Sherman Act. The case involves two questions: whether plaintiffs' amended complaint adequately alleges a restraint of trade substantially affecting interstate commerce, and whether dentistry as a "learned profession" is exempt from the application of the Sherman Act.[3]

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2. The district court minute entry indicated that: "[T]he antitrust claim should be dismissed because the activities complained of do not affect interstate commerce and because the procedures involved in joining professional associations do not constitute 'trade or commerce' within the purview of the antitrust laws . . ."

3. Plaintiffs also demand attorney's fees. It is inappropriate at this stage of the proceedings to discuss the propriety of such relief.

I. The Facts.

For the purposes of a review of a dismissal on the pleadings, we accept as true plaintiffs' material allegations in their first amended complaint. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948).

Defendants ASDA and CADS are non-profit corporations organized under the laws of Arizona. Briefly summarized, the identical objectives and purposes of the ASDA and the CADS are to improve public health and the profession of dentistry by encouraging research, disseminating new knowledge in the profession, advancing the standard of dental education, enlightening the public in relation to oral hygiene and advanced dental service, and promoting and maintaining a high order of professional excellence. Membership in the ASDA and the CADS is not a prerequisite to the practice of dentistry in Arizona; plaintiffs, however, derive substantial benefits from such membership including participation in continuing education programs, group insurance, the exchange of information with and the referral of patients by fellow members, and the entry into various specialty organizations of dentistry. Pursuant to the by-laws of the ADA and the ASDA, a dentist may not become or remain a member in good standing in the ASDA or the CADS without also being a member of the ADA. The by-laws of the ADA designate the ASDA as a constituent society; the

by-laws of the ASDA designate the CADS as a component society. The ASDA and the CADS remit the dues which they collect on behalf of the ADA to the ADA at its central office in Illinois. Plaintiff Vernon S. Boddicker tendered the annual dues for the ASDA and the CADS, excluding the annual dues for the ADA; the CADS rejected this tender and with the ASDA dropped him from their rolls. Plaintiffs Richard W. Peay and Hugh L. Thompson paid under protest the annual dues of all three organizations in order to retain their status as members in good standing of the ASDA and the CADS.

Defendant ADA is a nonprofit corporation organized under the laws of the State of Illinois. It provides a large range of services for dentists across the nation. A sampling of its nationwide activities is as follows: the publication and dissemination of journals, a newspaper, and newsletters, the conducting of dental aptitude tests, the accreditation of dental programs for hospitals, the providing of insurance programs for its members, and the dispatch of speakers to various states. As a result of its system of designating local organizations as constituent societies, which in turn require membership in it as a condition precedent to constituent society membership, the ADA collected in annual dues for 1972 an amount in excess of $6,000,000.

According to the amended complaint, expulsion from the local societies for failure to pay the ADA's dues will impair the ability of plaintiffs to practice dentistry

in that they will be prevented from participating in the programs and activities of the ASDA and the CADS. Moreover, plaintiffs alleged that payment of dues to the ADA for which they receive no benefit is an unreasonable condition to membership in the ASDA and the CADS, and that this financial burden is passed on to the consumer in the form of increased dental costs. They also allege that the practice of dentistry throughout the nation is similarly affected.

II. Jurisdiction.

In enacting the Sherman Act, Congress intended that the jurisdictional reach of the Act be coterminous with Congress' constitutional power to regulate commerce. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra; United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); Rasmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir. 1972), cert. denied, 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed.2d 1003 (1973).

This court has traced the history of the coordinated expansion of the Commerce Power and the reach of the Sherman Act many times. We need not retrace it here. The presence of Sherman Act jurisdiction depends on whether it is within the power of Congress to regulate the defendants' conduct of which the plaintiffs complain. The answer is clearly affirmative. Congressional power exists when the conduct exerts a "substantial economic effect" on interstate commerce. Wickard v. Filburn, 317 U.S.

111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942); Rasmussen v. American Dairy Ass'n, supra. Viewed from the jurisdictional standpoint of the Sherman Act, the Supreme Court recently indicated that the critical inquiry is "the adequacy of the nexus between [defendant's] conduct and [the] interstate commerce that is alleged in the complaint." Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. at 742, 96 S.Ct. at 1851 n.1. The nexus is unquestionably adequate here. The multistate scope of the ADA's membership, programs, and dues arrangements with local societies demonstrates this. These activities make possible a flow of funds, both from the individual dentists to the ADA and from the ADA to others, that substantially affects interstate commerce.[4] Moreover, the exclusion of the plaintiffs from the ASDA and the CADS pursuant to the dues arrangement can be considered "an inseparable element

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4. In addition, plaintiffs contend that expulsion from the local societies will diminish their practice and professional reputation. A less vigorous dental practice necessarily includes the use of fewer supplies, less equipment, etc. Although the amount of interstate commerce affected by the deterioration of three dentists' practices may seem insubstantial, like effects on the practices of similarly situated dentists across the nation probably will result in the altered flow of dental supplies in interstate commerce. See Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 (3rd Cir. 1973).

of a larger program dependent for its success upon activity which affects commerce between the states."[5] In any event, at

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5. United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297, 65 S.Ct. 661, 89 L.Ed. 951 (1945), quoted in Goldfarb v. Virginia State Bar, 421 U. S. 773, 784, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). Plaintiffs argue that the success of defendants' agreement is dependent upon the ability of defendant ADA to impose similar agreements on all local and state societies. Thus, the ADA has the weapon of potential ostracism from the dental community in its arsenal to coerce plaintiffs and to implement their program.

   Furthermore, plaintiffs' decidedly local status does not prevent them from availing themselves of the antitrust laws. See Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed. 2d 665 (1972). In Lehrman, Gulf Oil practiced a price support system throughout the southwestern states. A one-station operator challenged this practice as violative of section 1 of the Sherman Act. On the jurisdictional question, the Fifth Circuit found that the price support network in effect "throughout the Southwest" constituted the applicable "contract, combination, or conspiracy," id. at 32, and held that jurisdiction was present in spite of plaintiff's inherently local status. Cf. Simpson v. Union Oil Co., 377 U.S.

this stage of the proceedings, we cannot say that the challenged practices are more tenuous and remote from interstate commerce than were the practices of lawyers successfully challenged under the Sherman Act in Goldfarb v. Virginia State Bar, 421 U.S. 773, 781-85, 95 S.Ct. 2004, 44 L.Ed. 2d 572 (1975).

Therefore, we hold that the allegations contained within the first amended complaint set forth practices not beyond the reach of the Sherman Act.

III. The Learned Profession Exemption.

To dispose of the second question which this case presents, viz. whether dentistry is exempt from the Sherman Act as a "learned profession," we must consider primarily two recent Supreme Court decisions.

The first is Goldfarb v. Virginia State Bar, supra, in which the Court renounced an unlimited exemption from the Sherman Act for "learned professions." It stated:

> The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . Congress intended to strike as broadly as it

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footnote continued

13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). See also, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948).

> could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged upon us would be at odds with that purpose. 421 U.S. at 787, 95 S.Ct. at 2013.

In addition, it held that attorneys engaged in "commerce" when, under the circumstances of the case, they examined land titles in exchange for money and that the conduct of the Fairfax County Bar and the Virginia State Bar in publishing and enforcing minimum fee schedules amounted to price fixing in violation of section 1 of the Sherman Act.

The Court, however, did not hold that professions and their practices should be analyzed for Sherman Act purposes precisely as are ordinary commercial enterprises. This is made clear by the opinion's footnote 17 which reads as follows:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any

other situation than the one with which we are confronted today. 421 U.S. at 787-88 n. 17, 95 S.Ct. at 2013.

This footnote, however, offers little guidance with respect to the manner in which a particular practice of a profession should be approached to determine its compatibility with the Sherman Act other than to draw attention to the "public service aspect, and other features" of the profession.[6]

In some respects Cantor v. Detroit

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6. More guidance may be forthcoming. The Supreme Court recently decided to hear a case that challenges disciplinary rules controlling advertising by attorneys on the grounds that they violate the antitrust laws and the First and Fourteenth Amendments. Bates v. Arizona State Bar, 555 P.2d 640 (Ariz. Sup.Ct. 1976), cert. granted, 429 U.S. 813, 97 S.Ct. 53, 50 L.Ed.2d 73 (1976). The Arizona Supreme Court held that the antitrust attack must fail for three reasons: first, that the control of advertising is distinguishable from the price fixing arrangement in Goldfarb; second, that the state bar's actions are exempt as a state action under Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); and third, that no legislative body may interfere with the Arizona Supreme Court's reasonable regulation of its integrated bar.

Edison Co., 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) provides a portion of the additional guidance that is required by the problem of meshing the Sherman Act with proper professional practices. The guidance it supplies consists of the fact that a majority of the Cantor court, under the circumstances of the case, refused to immunize from a Sherman Act challenge a practice of a public utility approved by, and unalterable without the consent of, the state public service commission.[7] According to the plurality, the

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7. Pursuant to an order of the Michigan Public Service Commission, Detroit Edison provided light bulbs to its customers for no additional charge. It included, however, the cost of the light bulbs in its operating costs; as a result, the approved rates compensated for this additional cost. Plaintiff contended that the defendant was using its monopoly power in the distribution of electricity to restrain competition in the light bulb market; defendant interposed the defense that conduct required by state law is exempt from the Sherman Act. The plurality held that the conduct might be exempt if the private party had merely followed the command of the state; Detroit Edison, however, had participated in the formulation of that order to such an extent that the Court found that as a private party Detroit Edison had exercised a "sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the

exemption from the Sherman Act available in Cantor extended no further than "was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary'." Id. 428 at 597, 96 S.Ct. at 3120. Under this test the plurality of four found the practice violative of the Sherman Act and a majority of six Justices agreed with the result.[8] The involvement of the state

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consequences of his decision." Cantor v. Detroit Edison Co., 428 U.S. at 594, 96 S.Ct. at 3118. The Court next addressed the question of the propriety of the superimposition of antitrust standards on conduct already being regulated under a different standard. It rejected the simplistic view that the fundamental inconsistency of the two standards prohibited the application of the antitrust laws. Instead, the Court concluded that the light bulb program was not a necessary element of the regulatory scheme and that it would not be inconsistent to compel the utility to follow antitrust norms in business activities that are outside the realm of its natural monopoly.

8. The Supreme Court employed a similar analysis in Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976). Abbott Laboratories involved a determination of the extent to which the Nonprofit Institutions Act exempted certain sales from the

through its regulation of the practice afforded no immunity.

footnote continued

application of the Robinson-Patman Antidiscrimination Act. The Nonprofit Institutions Act limits the exemption to "purchases of their supplies for their own use by schools, . . . hospitals, and charitable institutions not operated for profit." The exempt status of the sales by defendant pharmaceutical companies to nonprofit hospitals hinged upon the Court's construction of the phrase "their own use." In construing this phrase, the Court recognized that the Nonprofit Institutions Act creates only a limited exemption; thus, the status of the purchaser as a nonprofit hospital does not entitle defendant sellers to a blanket exemption for all of their sales to such a purchaser. The Court then studied each category of a nonprofit hospital's drug usage to determine whether the conduct was such that it became "a part of and promote[d] the hospital's intended institutional operation in the care of persons who are its patients." Id. at 14, 96 S.Ct. at 1314. Therefore, when the hospital used the drugs as a necessary component to its role as a hospital, the Court held that the sale of these drugs to the hospital was exempt from Robinson-Patman; contrariwise, where the hospital's use was unnecessary to its basic function, the Court held that Robinson-Patman was applicable to sales to the hospital of

Goldfarb and Cantor make clear that neither an expansive "learned profession" nor equally expansive "state action" exemption exists to shelter the practices being challenged in this case. However, we believe, as already indicated, that the Supreme Court does not require that the practices challenged here be treated the same as would be proper if dentistry were merely a commercial enterprise.[9]

As we interpret the Court, to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which the profession exists, viz. to serve the public. That is, it must contribute directly to improving service to the public. Those which only suppress competition between practitioners will fail to survive the challenge. This interpretation permits a harmonization of

footnote continued

drugs so used. The Court perceived the fundamental inquiry to be the necessity of the use to the functioning of the exempt institution.

9. See the distinction drawn by the Chief Justice Burger between the commercial practices of pharmacists and the professional services of physicians and lawyers in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 1831, 48 L.Ed.2d 346 (1976).

the ends that both the professions and the Sherman Act serve.[10]

We recognize this interpretation provides only the principle to be employed in deciding specific cases. It is not a blueprint which will resolve all controversies and by which the professions can check their structures to determine whether they comply with the Sherman Act. Any such blueprint must await additional guidance by the Supreme Court and the resolution of specific cases by this and other courts.

At this juncture we can only hold that the arrangements of which the plaintiffs complain are not so obviously designed to improve dental services to the public as to permit us to sustain a motion to dismiss the complaint. A complaint should not be dismissed for failure to state a claim "'unless it appears beyond doubt that the plaintiff can prove no set of facts in

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10. In an exhaustive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded:

> "[T]he legislative history, in fact, contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare." Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.Law & Econ. 7, 10 (1966).

support of his claim which would entitle him to relief.'" Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. at 746, 96 S.Ct. at 1853, quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). We cannot say that the complaint fails to meet this modest standard. Further proceedings will provide the defendants the opportunity to demonstrate to the extent possible the manner in which the challenged arrangements promote the improvement of dental services to the public and the plaintiffs the opportunity to show to the extent possible the manner in which they suppress competition between practitioners of dentistry.[11]

REVERSED and REMANDED.

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11. The plaintiffs, of course, retain the burden to prove their case-in-chief by a preponderance of the evidence. See Ramsey v. United Mine Workers, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed. 2d 64 (1971). See also, Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137 (9th Cir.) cert. denied, 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974).

FITZGERALD, District Judge, dissenting:

This action arises from the fact that membership in the American Dental Association is a requirement for membership in the Arizona State Dental Association and the Central Arizona Dental Society. A licensed, practicing dentist in Arizona, such as plaintiffs, cannot belong to the State (ASDA) or local (CADS) society without also tendering dues for membership in the ADA. The ASDA and CADS collect annual ADA membership dues from their members and remit to the ADA. Plaintiffs object to the requirement of paying the ADA dues and complain that it violates sections 1 and 2 of the Sherman Act.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), makes clear that learned professions, including dentistry, are not beyond the reach of the Sherman Act. In Goldfarb, the professional conduct alleged to violate the Sherman Act was price fixing for legal services through use of a minimum fee schedule. The Virginia Bar argued for a wholesale exemption of legal profession activities from antitrust regulation, based on the rationale that competition is inconsistent with the practice of a profession since profit is not the principal goal of professional activities, which is to provide services necessary to the community. Recognizing this as the classic basis advanced to distinguish professions from trades, the Court observed that the rationale loses much of its force when used to support fee control activities.

The Court noted that the practice of law as a profession has a business aspect; the exchange of legal services in return for the client's money is "commerce." However, the Court cautioned against automatically applying antitrust concepts from other areas to the professions. The fact that a restraint operates upon a profession as distinguished from a business is relevant in determining whether the particular restraint violates the Sherman Act. 421 U.S. at 787, n. 17, 95 S.Ct. 2004.

In sum, I believe that Goldfarb narrowly holds that certain "business" or "commercial" activities of professionals are subject to antitrust regulation. Minimum fee schedules are obviously related to the commercial aspect of professional practice. Goldfarb instructs that any alleged restraint operating upon a profession should be closely examined in order to determine whether it restrains competition in professional services and thus involves the commercial aspect of professional practice.

The restraint imposed upon the dentists in the present case is simply that unless they belong to the American Dental Association, and pay its membership dues, they may not be members of either the state association or the local dental society. If the dentists fail to pay the ADA dues, they cannot participate in the activities of the state or local groups or attend seminars conducted by the various specialty professional and technical groups and societies in the several states. They may, however, continue to practice dentistry and to charge for these services as they see fit.

It is not alleged that the "restraint" consisting of the dual membership requirement functions to eliminate competition between dentists in providing dental services, or to restrict consumer choice of dental services. By contrast, the price fixing condemned in Goldfarb and the other cases[1] relied upon by the dentists are classic conspiracies restraining competition in services, and per se violations of the Sherman Act under established antitrust principles.

Moreover, plaintiffs do not claim that the ADA membership requirement is designed for any purpose other than to promote the improvement of dental services. Membership dues paid to the American Dental Association support its nation-wide activities including the administration of dental aptitude tests, the accreditation of dental programs, and the publication and dissemination of professional journals.

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1. United States v. Nat'l Soc'y of Professional Eng'rs., 389 F.Supp. 1193 (D.D.C.1974) (National Society rules prohibited members from engaging in competitive bidding for engineering services); United States v. Oregon State Bar, 385 F.Supp. 507 (D.Ore. 1974) (minimum fee schedule); United States v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950) (fixing of real estate commissions); N. California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir. 1962) (fixing prices of pre-compounded prescription drugs).

These activities are obviously designed to benefit the profession and improve the practice of dentistry. To the extent that this may be accomplished, the public is served.

The trial judge, as I understand his ruling, did not hold that learned professions are totally outside the scope of the Sherman Act. Rather he concluded that the particular professional activity at issue, the procedures and requirements for joining professional associations, falls outside the purview of the antitrust laws. I agree. Goldfarb does not go as far as to include within the scope of the Sherman Act professional activity, such as the ADA membership requirement, which has no alleged purpose or effect of suppressing competition between practitioners.

I would affirm the district court on another ground. Contrary to the majority conclusion, I do not believe the amended complaint alleges a trade restraint substantially affecting interstate commerce.

The amended complaint alleges that the defendant ADA engages in interstate commerce by using interstate communications facilities and by collecting dues from dentists and sending representatives to different states. However, the question is not simply whether the defendant engages in interstate commerce, but whether the alleged restraint substantially affects interstate commerce. The claim here is that the ADA membership requirement somehow restrains plaintiffs' practice of dentistry. Yet plaintiffs do not claim

that their dental practices involve interstate commerce. This distinguishes the instant case from Goldfarb, wherein the legal services, although performed in state, were an integral part of interstate real estate transactions.[2] 421 U.S. at 784, 95 S.Ct. 2004. The Supreme Court cautioned that there may be legal services that have no nexus with interstate commerce and therefore are beyond the reach of the Sherman Act. 421 U.S. at 785, 95 S.Ct. 2004.

In an attempt to show the requisite impact on interstate commerce, plaintiffs herein allege that they cannot attend out of state seminars conducted by various specialty and technical groups unless they pay the ADA dues. This alleged ineligibility to attend seminars does not amount to sufficient impact on interstate commerce.

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2. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), is also readily distinguishable from the instant case. The complaint in Rex Hospital alleged that defendants conspired to block the proposed expansion of plaintiff's hospital facility, and that plaintiff's facility purchased 80% of its supplies from out of state and derived a large share of its insurance revenue and finances from out of state. The alleged conduct of defendants thus adversely affected the very substantial volume of interstate commerce in which the plaintiff's hospital engaged.

Significantly, plaintiffs do not even assert a claim for the amounts they have paid in membership dues to the ADA because the cost of membership is passed on to the public, thereby occasioning no loss to the plaintiffs. I agree with the district court's conclusion that the complaint does not adequately allege a restraint of trade substantially affecting interstate commerce.

I would affirm.

APPENDIX C

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434 U.S. 825, 98 S.Ct. 73, 54 L.Ed.2d 83

ARIZONA STATE DENTAL ASSOCIATION, et al., Petitioners, v. VERNON S. BODDICKER, et al. No. 76-1636

Facts and Opinion, 549 F.2d 626

Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit.

Oct. 3, 1977. Denied

APPENDIX D

Boddicker, et al. v. Arizona
State Dental Association, et al.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled cause having come on regularly for trial before the Court, sitting without a jury, and at the close of plaintiffs' case, the Court having granted the motion of defendants to dismiss pursuant to Rule 41B, Rules of Civil Procedure, the Court makes the following

FINDINGS OF FACT

1. Each of the plaintiffs is duly licensed to practice dentistry in the State of Arizona; Dr. Boddicker withdrew from the active practice of dentistry in 1974 but the other plaintiffs continue to engage in the active practice of dentistry.

2. The Central Arizona Dental Society is an Arizona non-profit corporation which maintains an office and place of business in Maricopa County, Arizona.

3. The Arizona State Dental Association is an Arizona non-profit corporation which maintains an office and place of business in Maricopa County, Arizona.

4. The American Dental Association is an Illinois non-profit corporation which maintains offices and place of business in

Chicago, Illinois.

5. The Arizona State Dental Association is a constituent society of the American Dental Association and the Central Arizona Dental Society is a component society of the Arizona State Dental Association.

6. Any person licensed to practice dentistry in Arizona may become a member of the American Dental Association, the Arizona State Dental Association and the Central Arizona Dental Society.

7. A dentist desiring to become a member of either the American Dental Association, the Arizona State Dental Association, or the Central Arizona Dental Society must also become a member of the other two organizations; he cannot belong to only one of them.

8. An Arizona dentist who desires to become a member of the three professional organizations submits his application to the Central Arizona Dental Society. The application is acted upon by the Society and, following his acceptance of membership by the Society, the dentist automatically becomes a member of the Arizona State Dental Association and the American Dental Association.

9. All dues for the three organizations are paid to the Central Arizona Dental Society. It in turn remits the portions of the dues for membership in the other two organizations to the Arizona State Dental Association, which, in turn, remits the American Dental Association's portion to

the Association in Chicago, Illinois.

10. Annual dues of the Central Arizona Dental Society are presently $60, of the Arizona State Dental Association are presently $180 and of the American Dental Association are presently $150.

11. Membership in the three professional organizations is not necessary for licensing as a dentist in Arizona.

12. About 25% of the dentists in Maricopa County, Arizona, are not members of the three professional organizations.

13. Dentists who are not members of Central Arizona Dental Society, Arizona State Dental Association and American Dental Association can purchase services or products sponsored by or distributed by any one of the three organizations. Services and products include attendance at continuing education programs, malpractice insurance and other types of insurance, and subscription to The Journal of the American Dental Association and other publications, Guide to Dental Materials and Devices, and various pamphlets.

14. The Central Arizona Dental Society maintains a referral service for its members. The practice of none of the plaintiffs depended to a significant extent upon referrals from the Society.

15. Most of the activities of the American Dental Association either are interstate commerce or affect interstate commerce.

16. The requirement that a dentist who belongs to one of the three defendant professional organizations must also belong to the other two does not suppress competition between dentists in the State of Arizona or between dentists in the State of Arizona and dentists in other states.

17. Dentists who belong to the three defendant organizations have not monopolized the practice of dentistry in Arizona.

18. The membership requirements of the three defendant professional organizations do not have a direct and substantial effect on interstate commerce.

Based on the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW

1. The requirement that a member of either the American Dental Association, the Arizona State Dental Association or the Central Arizona Dental Society must also be a member of the other two professional organizations is not a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

2. The plaintiffs have failed to prove by a preponderance of the evidence that the challenged membership rule unreasonably suppresses competition between dentists in Arizona within the meaning of Section 1 of the Sherman Act, 15 U.S.C. §1.

3. The plaintiffs have failed to prove by a preponderance of the evidence that the defendants or their members have monopolized the practice of dentistry within the State of Arizona within the meaning of Section 2 of the Sherman Act, 15 U.S.C. §2.

Based on the foregoing findings of fact and conclusions of law,

IT IS ORDERED that plaintiffs take nothing by their complaint against defendants and that judgment be entered in favor of defendants.

DATED this 29 day of August, 1980.

Charles L. Hardy
CHARLES L. HARDY
UNITED STATES DISTRICT JUDGE

APPENDIX E

Boddicker, et al. v. Arizona
State Dental Association, et al.

United States Court of Appeals
For the Ninth Circuit
No. 80-5730
D.C. No. CIV 72-259

MEMORANDUM DECISION
OF THE COURT OF APPEALS

Filed: March 24, 1982

Before: PREGERSON and FERGUSON,
Circuit Judges, and
ORRICK, District Judge

Appellants, plaintiffs below, challenged the membership links between the defendant organizations on antitrust grounds. Trial was to the court, and after appellant had presented their case, the court granted appellees' motion to dismiss pursuant to Fed. R. Civ. P. 41(b) and entered judgment against appellants. We affirm.

(I) The district court rejected appellants' contention that the membership links between the defendant organizations constituted a per se illegal tying arrangement. This conclusion was correct. First of all, since appellants themselves admit that ADA is a unique organization to which no other is comparable, there would appear to be no market in the "tied product"--ADA memberships--for the challenged membership

requirements to restrain. Cf. Community Builders, Inc. v. City of Phoenix, 652 F.2d 823, 830 (9th Cir. 1981) (municipality's conditioning building permit on water hookup not a tying arrangement, because no competitive market for water services existed). Secondly, the relationship of the defendant organizations strongly suggests that membership in the local and state groups cannot be characterized as a product or service distinct from ADA membership. Finally, even if ADA membership is a product distinct from membership in the ADA's constituent and component societies, the latter derive no economic benefit from sales of ADA memberships, the alleged "tied product," so that no per se illegal tying arrangement can be found. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977).

(II) The district court found that appellants failed to carry their burden of proving by preponderance of the evidence that the challenged rules suppress competition between dentists--a burden which this court held that appellants would have to satisfy. Boddicker v. Arizona State Dental Association, 549 F.2d 626, 632 & n.11 (9th Cir. 1977). That finding was not clearly erroneous. Appellants have presented no arguments to demonstrate any adverse effect on competition between dentists from the challenged rules.

(III) Finally, the district court did not err in finding that the defendant organizations have not monopolized the practice of dentistry in Arizona. These organizations, in fact, do not engage in

the practice of dentistry, nor is membership in them a precondition for an Arizona dental license.

AFFIRMED.

APPENDIX F

Boddicker, et al. v. Arizona
State Dental Association, et al.

United States Court of Appeals
For the Ninth Circuit
No. 80-5730

O R D E R

Filed: May 7, 1982

Before: PREGERSON and FERGUSON,
Circuit Judges, and
ORRICK, District Judge

Appellants' petition for rehearing is denied.

APPENDIX G

§ 1 of the Sherman Act (15 U.S.C. § 1)

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX H

§ 2 of the Sherman Act (15 U.S.C. § 2)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

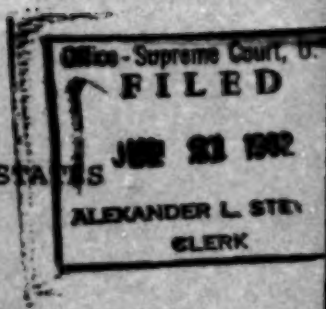
APPENDIX I

§ 16 of the Clayton Act (15 U.S.C. § 26)

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

No. 81-2347



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON, and DWIGHT G. HUDSON,

Petitioners,

v.

ARIZONA STATE DENTAL ASSOCIATION, CENTRAL ARIZONA DENTAL SOCIETY, and AMERICAN DENTAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ARIZONA STATE DENTAL ASSOCIATION, CENTRAL ARIZONA DENTAL SOCIETY AND AMERICAN DENTAL ASSOCIATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in view of the fact that petitioners failed to prove any competitive injury to dental practitioners, the trial court's finding that the challenged membership rule does not unreasonably suppress competition between dentists in Arizona within the meaning of Section 1 of the Sherman Act, 15 U.S.C. §1, was clearly erroneous.

2. Whether, since petitioners failed to prove that the respondents practice dentistry, failed to offer any proof of any relevant market, geographical or product or service, the trial court's finding that neither respondents nor their members have monopolized the practice of dentistry within the State of Arizona within the meaning of Section 2 of the Sherman Act, 15 U.S.C. § 2, was clearly erroneous.

RULE 28.1 STATEMENT

The American Dental Association, Central Arizona Dental Society and the Arizona State Dental Association have no parents or affiliates within the apparent meaning of Supreme Court Rule 28.1.

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IN THE
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October Term, 1982

No. 81-2347

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON, and DWIGHT G. HUDSON,

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OPINIONS BELOW

The Court of Appeals' Memorandum Decision affirming the trial court was

entered on March 24, 1982 (Pet. App. 30-32), and was re-filed as an Opinion on June 22, 1982.

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is incomplete and factually misleading. Thus, respondents have been compelled to provide this Court with a detailed factual statement in order to give this Court the same picture of the facts that the district court and the Court of Appeals had in rendering judgment for the respondents.

The Proceedings Below

Petitioners fail to review the full history and course of proceedings which is important in determining that the writ of certiorari should not be granted. The First Amended Complaint which was filed on December 16, 1974 in addition to the antitrust allegations, alleged that ADA

transacted business in Arizona in violation of Article 14, §5 of the Constitution of Arizona and §10-482, Arizona Revised Statutes, and that the membership rules violated the "Constitution of the United States, Article IV, Section 2, Clause 1, and the Fourteenth Amendment." These constitutional allegations were dismissed by the trial court prior to the initial appeal (United States District Court Civil Docket entry number [hereinafter CR] 46) and have been abandoned by petitioners.

Petitioners also failed to include the purpose of the remand articulated by the Ninth Circuit in Boddicker v. Arizona State Dental Association, 549 F.2d 626 (9th Cir.), cert. denied, 434 U.S. 825 (1977). In that opinion the Court of Appeals established the law of the case:

> Further proceedings will provide . . . the plaintiffs the opportunity to show to the extent possible the manner in which they [membership rules] suppress competition between practitioners of dentistry (549 F.2d at 632 (emphasis added)).

The Court of Appeals carefully instructed the petitioners that, on the remand, they retained their burden of proving by a preponderance of the evidence that the membership rules "suppress competition between practitioners of dentistry" (549 F.2d at 632 n. 11).

On the remand, at the conclusion of petitioners' case, the district court, sitting without a jury, entered judgment for the respondents pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. As a result, the trial court entered in part the following findings of fact, after hearing and reviewing all of the evidence:

Any person licensed to practice dentistry in Arizona may become a member of the American Dental Association, the Arizona State Dental Association and the Central Arizona Dental Society (Finding 6, Pet. App. 26).

Membership in the three professional organizations is not necessary for licensing as a dentist in Arizona (Finding 11, Pet. App. 27).

About 25% of the dentists in Maricopa County, Arizona, are not members of the three professional organizations (Finding 12, Pet. App. 27).

Dentists who are not members of Central Arizona Dental Society, Arizona State Dental Association and American Dental Association can purchase services or products sponsored by or distributed by any one of the three organizations. Services and products include attendance at continuing education programs, malpractice insurance and other types of insurance, and subscriptions to The Journal of the American Dental Association and other publications, Guide to Dental Materials and Devices, and various pamphlets (Finding 13, Pet. App. 27).

The requirement that a dentist who belongs to one of the three defendant professional organizations must also belong to the other two does not suppress competition between dentists in the State of Arizona or between dentists in the State of Arizona and dentists in other states (Finding 16, Pet. App. 28).

The district court then entered as Conclusions of Law that the membership rule is not a per se violation of Section 1 of the Sherman Act (Conclusion 1, Pet. App. 28), that petitioners failed to prove by a preponderance of the evidence that the challenged membership rule unreasonably suppresses competition between dentists in Arizona within the meaning of Section 1 of the Sherman Act (Conclusion 2, Pet. App. 28) and that petitioners failed to prove by a preponderance of the evidence that the respondents or their members have monopolized the practice of dentistry within the State of Arizona within the meaning of Section 2 of the Sherman Act (Conclusion 3, Pet. App. 29).

The United States Court of Appeals did not find any of the trial court's findings of fact to be erroneous. It thus affirmed

the district court's findings that no unlawful tie-in was proven as a matter of fact, that petitioners failed to sustain their burden of proving by a preponderance of the evidence that the membership rules suppress competition and that petitioners failed to prove that respondents or their members monopolized the practice of dentistry in Arizona (Pet. App. 30-32).

It is respondents' position that this case only involves the question of the sufficiency of petitioners' proof which the Court of Appeals has correctly decided. There is no division among the Circuits nor does this case raise any important federal questions. It is clear, therefore, that the petition fails to comply with Supreme Court Rule 17 and should be denied.

Nature Of The Case

Petitioners, three practicing Arizona dentists and one retired one, purport to bring this action under §§1 and 2 of the Sherman Act (Reporter's Trial Transcript [hereinafter RT] Vol. 1, pp. 101). However, the evidence in this case shows the real reason that this lawsuit was brought, and that reason had nothing to do with competition in the dental market in Arizona, nor did it have anything to do with the Sherman Act. On the contrary, petitioners testified truthfully that this action was filed only because of political and philosophical objections to the respondent organizations (RT Vol. 1, pp. 119-120, 122; RT Vol. 2, pp. 62-63).

It is not surprising in view of the real motivation in bringing this lawsuit that the petitioners' proof failed to show any

adverse impact on competition among dental practitioners in Arizona as a result of the respondents' membership rule, which burden the Court of Appeals specifically placed upon petitioners on the remand (549 F.2d 626, 632 n.11).

In Arizona, dentists obtain the right to practice through state licensure, and the membership rule does not affect state licensure. In addition, the evidence is that approximately 25% of the dentists in the state and 31% to 35% of the dentists in Maricopa County are not members of the respondent organizations, and that their practice has not been adversely affected by reason of the lack of membership. The record also shows that non-members may obtain the essential services of the respondents on a cost payment basis.

With reference to §2 of the Sherman Act, there is not even a scintilla of evidence in this record that is probative of monopolization. Conceptually since respondents do not practice dentistry in Arizona, it is impossible to show that respondents have violated §2 of the Sherman Act.

Facts

Respondent Associations

Respondents are a federation of non-profit dental organizations whose purpose is "to encourage the health of the public, to promote the art and science of dentistry and to represent the interests of the dental profession and the public which it serves" (Pretrial Order, CR 178, p. 9).

To further these goals, the associations have organized themselves on three levels: national, state and local. The national

association, the American Dental Association ("ADA"), charters "constituent" societies, or state organizations such as the Arizona State Dental Association ("ASDA") (Plaintiffs' Exhibit [hereinafter PX] 2, ADA Constitution and Bylaws, Chapter II, pp. 13-17), and these state associations charter "component" societies such as the Central Arizona Dental Society ("CADS") (PX 2, Chapter III, pp. 17-18).

ADA

ADA's policies are controlled by its members through constituent and component societies. ADA's supreme legislative body, the House of Delegates, is composed of members elected by constituent and component societies and it controls ADA policy (Pretrial Order, CR 178, p. 10).

The reason for this federated membership was that if all dentists nationwide belonged

to one organization there would be a stronger, more unified voice representing dentistry (RT Vol. 2, pp. 50-51).

The ADA engages in significant activities designed to improve the art and science of dentistry including the publication of dental journals and newsletters, dental aptitude testing, dental health programs for children, promotion of fluoridation of public water supplies, dental research, improvement of dental education, promotion of continuing dental education, maintenance of a central dental library and facilitating an interchange of information among dentists (RT Vol. 1, pp. 12-13).

Voluntary And Non-Discriminatory Membership

Membership in the association is purely voluntary and the parties stipulated that "[t]he practice of dentistry is governed by

state licensing requirements, not by requirements of ADA membership" (CR 178, pp. 9-10). The record shows that approximately 25% of the dentists in Arizona do not belong to the dental associations (RT Vol. 1, p. 5), and that 31% to 35% of the dentists in Maricopa County do not belong to respondent associations. Neither ASDA nor CADS receives any money as a consequence of participating in the collection of ADA dues (RT Vol. 1, p. 62). Membership is available to all licensed Arizona dentists.

The Petitioners

This lawsuit was not brought pursuant to Rule 23 of the Federal Rules of Civil Procedure (CR 39) and thus involves only the four dentists named as petitioners (RT Vol. 1, p. 76). Petitioners' counsel conceded at trial that this was not a class action, and the trial court sustained respondents'

objection to purported testimony concerning other non-party dentists (RT Vol. 1, pp. 76-77). Thus, petitioners' references to "all dentists similarly situated" (Pet., p. 6) are not supported by the record, since this case only involves the interests of the four named petitioners.

Dr. Vernon S. Boddicker

Dr. Boddicker testified that prior to his retirement he practiced in Phoenix as a prosthodontist (one who works with dentures) for twenty-eight years (RT Vol. 1, pp. 68-69). Dr. Boddicker was once President of CADS (RT Vol 1, p. 70) and was an alternate delegate to the ADA between 1961 and 1966 (RT Vol. 1, p. 71).

In 1971, Dr. Boddicker presented a motion before the ASDA House to change the membership rules in order that ASDA members would not have to belong to ADA (RT Vol. 1,

p. 99). The proposal was voted down by the ASDA House (RT Vol. 1, p. 100) and Dr. Boddicker never presented a similar proposal to the ADA House.

Dr. Boddicker objects to the ADA because of his political and philosophical opposition to it. He conceded at trial that he would not have brought this lawsuit if ADA leaders had agreed with him politically and philosophically over the years (RT Vol. 1, p. 122).

Dr. Boddicker voluntarily chose not to renew his ADA membership in 1972 (RT Vol. 1, p. 98). He testified that one need not belong to ADA to belong to dental specialty organizations (RT Vol. 1, pp. 73-74), and that his loss of membership in a specialty organization was because of his voluntary conduct (RT Vol. 1, p. 82).

In 1970, Dr. Boddicker sold his practice (RT Vol. 1, p. 102, Exhibit 11H) in order to get a good price for it before he became too old to maintain it.

Dr. Richard W. Peay

Dr. Peay practices general dentistry in Phoenix, Arizona (RT Vol. 1, p. 133). In 1971, he sought to pay dues to ASDA and CADS without paying dues to ADA. He was told that he could not do so and has consistently paid his dues to all three organizations (RT Vol. 1, pp. 138-142).

Dr. Peay has not ever raised his fees as a consequence of his ADA, ASDA and CADS dues (RT Vol. 1, pp. 144-145). Significantly, Dr. Peay expressly testified that the ADA, ASDA and CADS, operating together, promote the improvement of dental services to the public (RT Vol. 1, p. 174).

Dr. Hugh L. Thompson

Dr. Thompson has practiced general dentistry in Phoenix since 1952 (RT Vol. 2, p. 4).

Dr. Thompson at one time sought referrals from the CADS (RT Vol. 2, p. 9). He had his name removed from the CADS referral list because he received calls late at night from patients who 50 percent of the time failed to show (RT Vol. 2, p. 10).

Dr. Thompson views dentistry as a business in certain respects (RT Vol. 2, p. 15), but would never allow economic concerns to override matters of ethics and professionalism (RT Vol. 2, pp. 25-27).

Dr. Dwight G. Hudson

Dr. Hudson practiced general dentistry in Phoenix and Scottsdale for forty-two years (RT Vol. 2, p. 30). He testified that many years ago, dentists could join CADS and

ASDA without joining ADA (RT Vol. 2, pp. 31-32). In the 1930's or 1940's, Arizona dentists voted to affiliate with the ADA organization because of "the fact that if all dentists belonged to this organization that we could represent a stronger more unified voice" (RT Vol. 2, p. 50). This was voted on voluntarily since "[t]hey [ADA] certainly didn't have a club over our heads" (RT Vol. 2, p. 50). He also testified that when ASDA became a part of the ADA we lost control (RT Vol. 2, p. 51).

Dr. Hudson also objects to ADA's political positions, which he testified is the real reason this lawsuit was filed (RT Vol. 2, p. 63).

Dr. Hudson testified that continuing education is available from many sources including the L.D. Pankey Institute of

Advanced Dental Education (RT Vol. 2, p. 53), commercial courses in Phoenix (RT Vol. 2, p. 54), and by simply arranging to observe the work of prominent dentists (RT Vol. 2, pp. 56-57). These courses are of high quality and do not require ADA membership in order for a dentist to attend (RT Vol. 2, p. 67).

REASONS FOR DENYING THE WRIT

SINCE THIS CASE INVOLVES ONLY QUESTIONS REGARDING THE SUFFICIENCY OF PETITIONERS' PROOF THE WRIT SHOULD BE DENIED

When the Ninth Circuit remanded this case after the initial appeal, it did so to permit "the plaintiffs the opportunity to show to the extent possible the manner in which they [the membership rules] suppress competition between practitioners of dentistry", and quite properly stated that "[t]he plaintiffs, of course, retain the

burden to prove their case-in-chief by a preponderance of the evidence" (549 F.2d at 632 n. 11). This established the law of the case.

Rule 41(b) of the Federal Rules of Civil Procedure provides that if judgment is entered against the plaintiffs on the merits, findings shall be entered as provided in Rule 52(a). Rule 52(a) in turn provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". This Court has consistently adhered to this standard of review. See, e.g., United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949); Besser Manufacturing Co. v. United States, 343 U.S. 444, 448 (1952).

Since the Court of Appeals correctly held that the district court's findings were not clearly erroneous, the petition for a writ should obviously be denied. Contrary to petitioners' contentions, because of the complete lack of proof in the record, this case will not have any impact on "thousands of dentists." Nor does this case have anything whatsoever to do with that line of cases dealing with the application of the antitrust laws to the professions. Neither the district court nor the Court of Appeals relied on those cases. The record fully justified the Court of Appeals' affirmance.

It is also an insult to both the district court and the Court of Appeals to suggest that petitioners were treated in a cavalier fashion. Petitioners were given every opportunity to prove suppression of competition among dentists in the trial

court and they failed to do so. The fact that a case with as little substance as this one has managed to remain in the courts since 1974 is tribute to the fairness of the judicial system.

Petitioners Failed To Show Any Unreasonable Restraint Upon Competition

The Sherman Act is only intended to prevent unreasonable restraints upon competition. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). Thus, petitioners were required to come forward with evidence demonstrating that the membership rule at issue diminished competition among dentists.

Such evidence as petitioners did adduce fully supports the district court's finding that the membership rule does not suppress competition. The parties stipulated that membership is not required for licensure in

Arizona (CR 178, pp. 9-10). There is also specific testimony that membership is not a prerequisite to the successful practice of dentistry in Arizona, and that many dentists practice successfully without membership in respondents (CR 123, p. 50; CR 203, p. 20). Thus, the membership rule can have no adverse effect on the practice of dentistry in Arizona.

The record further establishes that any licensed Arizona dentist may join the associations. Moreover, non-members may purchase products and services from the respondents on a cost of service basis. Thus, non-members may take advantage of respondents' services and products (Finding 13, Pet. App. 27), underscoring the completely voluntary nature of the organizations.

Indeed, to the extent petitioners testified as to any injury, it was political, not competitive (RT Vol. 1, p. 122; RT Vol. 2, pp. 51, 61-63).

In the instant matter, petitioners failed to demonstrate any competitive injury, and no effort by petitioners to argue that they represent all of the dentists in the country will change it. As noted earlier, this is not a class action and hence constitutional standing requirements prevent this from being anything other than an action by these 4 petitioners. See, e.g., Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

The Membership Rule At Issue Does Not Constitute A Tying Arrangement

Petitioners failed to prove that this case falls within the traditional definition

of a tying arrangement. In fact, in this instance, where the "products" or "services" are composed of organizations of highly educated members who have chosen to affiliate, that contention is less than serious. Petitioners conceded that the ASDA House of Delegates had rejected petitioners' efforts to withdraw from the national organization (RT Vol. 1, pp. 74, 99-100; RT Vol. 2, pp. 6-7). Such membership organizations simply are not separate "products" or "services" within the meaning of tying law.

Economists maintain that it is even futile to tie products or services that are consumed in fixed proportions such as membership in the associations, and thus further teach us that products or services which are consumed in fixed proportions are

not tying arrangements, they are functionally one product or service:

> Cannot monopoly power be created by tying goods which are used in fixed proportions? The answer is "no" because profits cannot be increased in this manner. To see why, consider the following example. Gloves are consumed in fixed proportions. Very few people would wish to use a right hand glove without using a left hand glove. Therefore, consumers think of the two products as one. Considered as a package, there is a maximum amount that an individual is willing to pay for the two gloves. Suppose it is seven dollars. One glove could be sold at two dollars, but the maximum amount received is still seven dollars. And if a producer tries to sell the first glove at six dollars, he will find that the consumer will no longer purchase from him because he has exceeded the seven dollar limit. It is irrational to tie goods which are consumed in fixed proportions because there is no way that the arrangement can increase profits as compared to a situation where the two goods are sold separately. Warren, Antitrust in Theory and Practice, p. 196 (1975) (emphasis added).

Elementary economics also plainly establishes that the economic issues usually addressed in order to determine if a tying

agreement has possible anticompetitive implications include such things as leverage, i.e., the extent to which a single seller can transfer market power from one market to another; coercion, i.e., the extent to which a seller can force a buyer to take something the buyer does not want; foreclosure, i.e., the extent to which a significant portion of a market is barred from other competitors, and justifications, or offsetting benefits, from the arrangement (Warren, supra, pp. 191-202).

The membership rule simply does not constitute a tying arrangement under traditional economic analysis. The leverage and foreclosure theories do not apply because they are inapplicable to non-profit organizations. The reason for this is that the theories described apply where a profit-making firm that is the leading firm

or dominant firm in one market seeks to extend its market power into another market in order to gain higher profits in the second market. The coercion theory does not apply for the reason that it is applicable to products used in variable proportions and not fixed proportions. The membership organizations would be used in fixed proportions such as the earlier illustration involving the purchase of a left and right glove. A buyer is willing to pay a maximum price which reflects the value of the product or service used in fixed proportions and will simply not purchase the product or service if the price exceeds the maximum. Therefore no coercion is possible. This contrasts with the situation where the products are used in variable proportions such as a case where a dominant computer firm ties to the sale of its computer the

purchase of its computer punch cards (Warren, supra, p. 196).

The fact that we are dealing with membership organizations which could dissolve their membership arrangement with the ADA further undermines the coercion theory.

Although there plainly is no tying arrangement here, petitioners appear to be arguing that the tying product is the Central and Arizona dental associations and the ADA is the tied product. If it is argued that the CADS and ASDA are the tying product and together they attempt to extend their market power into the tied good market (ADA) the appropriate economic test for evaluating the success of that effort would be a restriction of output in the tied good market (See Warren, supra, pp. 203-204). The petitioners failed to prove any

reduction in output in the tied good market.

A review of ADA, ASDA and CADS activities shows that the organizations operate primarily in the market for the dissemination of information to dentists or others interested in dental health (PX 53(b); CR 178, Exhibit A; CR 178, pp. 11-14). That, therefore, is the relevant product market. It is important to delineate a relevant product market in order to determine if competition is affected by the alleged tying agreement. The question is the impact on competition, not on a particular competitor or competitors, and a review of the various dental associations' rules and activities reveals that the ADA operates in the relevant product market we have defined on a national level, ASDA and CADS on a local or regional level.

Dentists, on the other hand, operate in various local markets and submarkets providing dental services to the public. Therefore, a requirement of joining any of the dental associations has no impact on competition because dentists and the associations do not operate in the same market. Moreover, a requirement of joining a dental association in no way limits the ability of an individual dentist to provide dental services to the public (CR 178, pp. 9-10).

The dental organizations are strictly voluntary groups. The State of Arizona, not ADA, licenses dentists to practice dentistry, and Arizona does not require that dentists belong to any of these organizations (CR 178, pp. 9-10). ADA itself certainly does not practice dentistry and it lacks the power to restrict the

output of dental services by dental practitioners. Clearly a requirement that an ASDA member join the ADA would have no such effect.

The ADA, ASDA and CADS are federated membership organizations constituting one "product" or "service", as defined by their members. This structure is emphasized by the fact that each state organization is represented in ADA's House of Delegates, the ADA's legislative body, and that 14 geographically determined Trustee Districts send representatives to ADA's administrative body, its Board of Trustees (CR 178, pp. 10-11). Just as an automobile is one product composed of a frame, an engine, tires and seats designed to provide transportation (even though one might, of course, fit a Chevrolet engine in a Ford automobile), ADA is functionally one

organization composed of local, state and national societies federated to improve the art and science of dentistry. The very terms "constituent" and "component" societies suggest the integrated nature of the organization. Since there is only one "product", there can be no tie-in. See, e.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 512 F.2d 1264 (9th Cir. 1975).

The structure of the dental organizations is a more efficient way of producing and disseminating information. If each local or regional association had to duplicate the information gathering and information disseminating activities that occur at the national level, it would be much more costly and inefficient and result in much higher dues and undoubtedly less

information disseminated (RT Vol. 1, p. 95).

The instant situation is analogous to that in Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981), in which the Court of Appeals held that a requirement by McDonald's Corporation that its franchisees lease a building owned by McDonald's in order to enter into the franchise agreement was not a tie-in. Rather, the lease and the franchise agreement were "integral components of the business method being franchised" (631 F.2d at 309). So too are the levels of ADA membership integral components to the association.

A further gap in petitioners' "tie-in" analysis is the lack of any showing of a direct, common economic interest in the alleged tie. ASDA and CADS obtain no money

as a consequence of participation in the dues collection process (RT Vol. 1, p. 62). A showing of direct, common economic interest is essential to support a finding of illegality. See, e.g., Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977).

Accordingly, the membership rule does not constitute a tying arrangement as a matter of fact and this finding is again fully supportable by the record.

Distinguishing Petitioners' Authority

None of the tying cases cited by petitioners is relevant. Petitioners' principal authority is Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958). In Northern Pacific, the railroad used the considerable market power that it had by virtue of owning 40 million acres of strategically located land as leverage to

force the purchasers of that land to ship their goods on its trains. As such, Northern Pacific represents a situation in which leverage was used by a profit-making entity in one market (land) to transfer or "leverage" market power into another market (shipping) in order to enhance its profits in the second market and foreclose competing railroads. The restraint involved variable proportions since the land was not sold in fixed proportions to the shipping market. Thus Northern Pacific differs from this case because it involves profit-making entities, because the "tied" goods relate to the "tying" goods in variable proportions, and because the railroad had a direct economic interest in the tied market.

Petitioners also cite Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969)

(Fortner I), for the proposition that tying arrangements are unlawful per se. But the Fortner I Court held only that plaintiff's case should not have been dismissed on a motion and that plaintiff could attempt to prove market power in the tying good (credit) by showing "uniqueness." However, "uniqueness" meant only that the defendant had some particular economic advantage over competitors (394 U.S. at 505 n.2).

"Market power", in the Fortner II context means that "market power in the sense of power over price must still exist" (United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620 n. 13 (1977) (Fortner II)). In Fortner II, the Court concluded that plaintiffs proved only that U.S. Steel was willing to offer inexpensive credit in order to sell expensive houses. Justice Stevens noted

that the entire concept of tying leverage made no sense because of the fixed proportions of the tying and tied products:

> But in this case Fortner was only required to purchase houses for the number of lots for which it received financing. The tying product produced no commitment from Fortner to purchase varying quantities of the tied product over an extended period of time. This record, therefore, does not describe the kind of "leverage" found in some of the Court's prior decisions condemning tying arrangements (429 U.S. at 617-18).

Thus, the Fortner cases relied upon by petitioners support respondents' position since Fortner II demonstrates that proof of market power is necessary in a tying case and that in order to prove it, the relationship between the tied product and the tying product must be variable and not fixed, and thus market power may not be proven from the "tying arrangement."

PETITIONERS FAILED TO INTRODUCE ANY EVIDENCE WHATSOEVER PROBATIVE OF A MONOPOLY AND THUS RAISE NO IMPORTANT QUESTION OF FEDERAL MONOPOLY LAW

The district court's finding that petitioners failed to prove by a preponderance of the evidence that respondents or their members have monopolized the practice of dentistry in Arizona was fully supported by the evidence, as was correctly found by the Court of Appeals. In their First Amended Complaint, petitioners alleged that ADA has "monopolized" dental care, but they made no effort to prove any monopolization claims under Section 2 of the Sherman Act.

Petitioners failed to define a relevant market, including both a product market and geographic market. See, e.g., Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934).

After proving the existence of a relevant market, it was incumbent upon petitioners to show that within that market the respondent "has the power to control prices or exclude competition." See, e.g., Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. Grinnell Corp., 384 U.S. 563 (1966).

There was a complete failure of proof because petitioners failed to define the particular product or market that they contend has been "monopolized." Moreover, the ADA or ASDA or CADS simply does not practice dentistry. Therefore, they could not have monopolized dental practice.

Since dentistry is practiced by thousands of individuals throughout the nation who need not belong to the ADA in

order to practice, and since the ADA does not render dental services to the public, a claim of monopolization is at best frivolous.*

CONCLUSION

The petition for a writ of certiorari should be denied because it does not comply

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* Areeda and Turner state that "[m]onopoly exists when one firm controls all or the bulk of a product's output, and no other firm can enter, or expand output, at comparable costs. In such circumstances, the firm has the power to raise price[s] above competitive levels by restricting its output, because the output reduction cannot be offset by expanded output of others." 2 Areeda and Turner, Antitrust Law, §403(a), p. 271 (1978). ADA controls none of the output of dentistry, since any dentist can practice independent of ADA membership.

with Supreme Court Rule 17, and because the decision of the Ninth Circuit is correct.

Respectfully submitted,

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July 19, 1982

NO. 81-2347

Office - Supreme Court, U.
FILED
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ALEXANDER L. STEVAS
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Petitioners,

vs.

ARIZONA STATE DENTAL ASSOCIATION, an Arizona Non-Profit Corporation; CENTRAL ARIZONA DENTAL SOCIETY, an Arizona Non-Profit Corporation; AMERICAN DENTAL ASSOCIATION, an Illinois Non-Profit Corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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PETITIONERS' REPLY BRIEF

This Reply Brief is submitted on behalf of Petitioners pursuant to Rule 22.5, Rules of the Supreme Court of the United States, and is addressed to "arguments first raised in brief" of Respondents.

Respondents have, for the most part, made distorted observations concerning

the facts, with little or no supportive law, in an obvious effort to put the Petitioners in a bad light. Accordingly, we respond to statements and/or arguments submitted by Respondents, as follows (references are to pages of Respondents' Brief in Opposition):

Page 15: The statement that Dr. Boddicker presented a motion before the ASDA House to change the membership rules in order that ASDA members would not have to belong to ADA; that the proposal was voted down by the ASDA House; "and Dr. Boddicker never presented a similar proposal to the ADA House." Response: The fact of the matter is that Dr. Boddicker, in 1972, met with the then ADA president, and also Dr. Morrison, ADA Trustee from the 13th District, and discussed the same proposal with said representatives, to no avail. R. T. Vol. 1, p. 75, lines 7-23).

Pages 8, 15, 18, 24: Statement that this

action was filed by Petitioners only because of "political and philosophical objections to the Respondent organizations." Response: Without reciting actual testimony, the objections of plaintiffs is that the end result of the conduct, activities and principles of the Respondent organizations is the economic impact upon the practicing dentist, his patients, and the public at large; that the ADA has continued to promote the Dental Service Corporation and/or third party payment for dental care, as opposed to promoting excellence in dentistry on the part of the dentists as a corollary to preventive dentistry on the part of the general public.

Pages 10-12, 32-33: The statement that the Respondent organizations constitute a "federation." Response: This argument was raised, for the first time, in Respondents' brief in the Ninth Circuit,

and is an obvious effort to, belatedly, divert the Respondent organizations into divisions, of a single entity, rather than separate entities. However, the ADA has consistently denied any agency as to Respondents ASDA and CADS. Also, on page 29 of their Brief in Opposition, Respondents state:

> "The fact that we are dealing with membership organizations which could dissolve their membership arrangement with the ADA further undermines the coercion theory."

Also, each organization establishes its own membership dues, and each of the Respondents is a separate, distinct corporation and, as such, the conspiracy is maintained.

Pages 13-14, 24: Statement that the action is not a class action; was not brought pursuant to Rule 23 of the Federal Rules of Civil Procedure. Response: However, it must be noted that the action is brought by the Petitioners on behalf

of "all dentists similarly situated." Therefore, in the event of an adverse ruling as to the Plaintiffs' (Petitioners'), the judgment would only be binding upon the Plaintiffs', but not as to any other dentist "similarly situated." But, in the event of a judgment favorable to the Plaintiffs (Petitioners), the judgment would not only inure to the benefit of the Plaintiffs but would also bind the Defendants (Respondents), and particularly the Defendant ADA, in suits by other dentists "similarly situated." See Katz vs. Carte Blanche Corporation, 496 F.2d 747, 758-759 (3rd Cir. 1974); Bogus vs. American Speech & Hearing Association, 582 F.2d 277, 289 (3rd Cir. 1978); Blonder-Tongue Laboratories, Inc. vs. University of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434 (1971); Bruszewski vs. United States, 181 F.2d 419 (3rd Cir. 1950).

Page 15: Statement that Dr. Boddicker

testified "that one need not belong to ADA to belong to dental specialty organizations. (R.T. Vol. 1, pp. 73-74), and that his loss of membership in a specialty organization was because of his voluntary conduct (R.T. Vol. 1, p. 82)."

Response: The fact of the matter is that Dr. Boddicker testified relative to his membership in the American Prosthodontic Society, as follows:

> "Question: But at that time did membership in the American Prosthodontic Society also require membership in the ADA?
>
> Answer: Oh, yes, I would have been dropped anyway."

R.T. Vol. 1, p. 82, lines 19-21. In addition, he testified that, since the filing of this law suit, the by-laws of the society had been changed where ADA membership is no longer necessary. R.T. Vol. 1, p. 73, line 4, p. 74, line 2.

Page 16: Statement that Dr. Boddicker "sold his practice in order to get a good

price for it before he became too old to maintain it." Response: Said statement is totally false. The testimony was:

> "A Well, I had seen a lot of older men who let their practice deteriorate as they gradually slowed up to where when they quit they could hardly get enough to pay for their equipment to sell their practice. So, I thought, well why not get a young man who would be willing to take it over so that I could get a substantial sum for my practice to do it, but with the agreement that I could practice as much or as little as I wanted to for a period of ten years. That way if I wanted to retire I could. If I wanted to work on for ten years and beyond, because, after all, that agreement has now ended, I could go back to practice tomorrow if I wanted to, and the agreement would not prohibit me from doing it." R.T., Vol. 1, p. 102.

Page 23: Statement that "Thus, the membership rule can have no adverse effect on the practice of dentistry in Arizona." Response: The fallacy of this statement is that the membership rule does not prevent a dentist from practicing, if he wants to forego membership in any of the Respondent organizations. The adverse

effect results when the dentist, desiring to belong to one of the Respondent organizations, is compelled to belong to all three organizations--on an all or none basis. The Respondents, instead of being competitive, have destroyed competition as between themselves. Thus, as stated in the dissenting opinion of Justice Stevens, in Broadcast Music, Inc. vs. Columbia Broadcasting System, Inc., 441 U.S. p. 33, 99 S. Ct. p. 1569:

> "In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all."

Pages 27-28: Respondents get into the economic aspect of leverage, coercion and foreclosure theories which, as stated, have no applicability in this matter, except for "coercion". However, each of the Respondent organizations condition purchase of its membership upon the additional purchase of membership in the other two

Respondent organizations. Therefore, no additional proof of "coercion" is necessary. Bogus vs. American Speech & Hearing Association, 582 F.2d 277, 287 (3rd Cir. 1978); United States vs. Realty Multi-List, Inc., 629 F.2d 1351, 1364 (5th Cir. 1980).

Page 39: Respondents' contention that "Petitioners failed to introduce any evidence whatsoever probative of a monopoly and thus raise no important question of federal monopoly law," followed by a statement that "Petitioners failed to define a relevant market, including both a product market and geographic market."

Response: Relevant geographic market has been defined as:

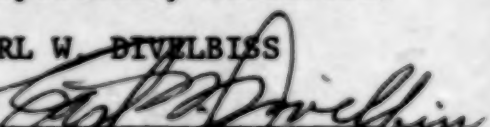
> " * * * The area of effective competition defined in terms of where buyers can turn for alternative sources of supply." Moore vs. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977).

The crux of the definition is "where buyers can turn for alternative sources of supply." Here, there is no alternative

source of supply. The market for the sale of the ADA membership is all of the fifty states, plus any other locale where a constituent society of the ADA may exist. The market for the constituent and component societies (like the ASDA and CADS) is confined to their particular locale. As stated in our Petition (p. 9) the sole exception is that a dentist in the federal dental service (Army, Navy, VA, public health service) is allowed to obtain membership in the ADA, but without membership in a constituent or component society. Thus, the ADA, at least, gives recognition to a separate and distinct ADA membership.

Respectfully Submitted:

CARL W. DIVELBISS

By 

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